Lian Meng Wah v Uma Parvathy Thothathri

HIGH COURT (KUALA LUMPUR) — SUIT NO S-22–862 OF 2005
NIK HASMAT JC
28 MARCH 2012

Tort — Negligence — Damages — Claim against solicitor — Document of title deposited to solicitor — Allegation that solicitor mishandled issue document of title — Whether document misplaced — Plaintiff entered into sales and purchase agreement of land — Sale of land aborted — Sales and purchase agreement with intending purchaser terminated — Whether solicitor negligent — Whether misplaced document caused sales of land to be aborted and sales and purchase agreement to be terminated — Whether misplaced document contributed by plaintiff

The plaintiff, a former member of the Malaysian Bar claimed against his former solicitor ('the defendant') for purported negligence in the handling of an issue document of title ('IDT') which resulted in losses to the plaintiff. Pursuant to two declaration of trusts, it was alleged that the plaintiff deposited with the defendant, the issue document of title in respect of a piece of agriculture land pursuant to a sale and purchase agreement with the original vendor ('the first SPA'). The plaintiff claimed that the IDT which had been deposited with the defendant was misplaced by the defendant at a time when the plaintiff had entered into a further sales and purchase agreement with one Mr Gunasekaran ('the intending purchaser') ('the third SPA') resulting in the aborted sale of the plaintiff's land and the termination of the plaintiff's third SPA with the intending purchaser. The plaintiff claimed that due to the defendant's alleged negligence in the handling of the IDT, the plaintiff was denied of an opportunity to sell the land and, consequently deprived of potential capital gain on his investment. The plaintiff claimed for the losses and damages against the defendant. The defendant denied any negligence in the handling of the plaintiff's IDT and contended that the defendant had at all material times done and executed all necessary acts in the safekeeping and retrieval of the plaintiff's misplaced IDT. According to the defendant, the plaintiff had deposited the IDT into the defendant's custody on his own accord at a time when the plaintiff, having been suspended from the Bar, required the defendant's firm to store his documents and manage his legal affairs. The plaintiff had been informed by the defendant to collect his personal documents from the defendant's office but had failed to do so. Therefore, the defendant contended that the plaintiff's purported losses and damages were caused and contributed by the plaintiff's own unreasonable conduct and inaction. The issues that arose for determination were the legal capacity of the plaintiff to execute the third

SPA; the alleged negligence of the defendant; whether the transaction was legal and whether the plaintiff succeeded in proving losses.

Held, dismissing the claim:

(1) The plaintiff failed to prove that the defendant was negligent in the handling of the plaintiff's said IDT which resulted in consequent losses and damages to the plaintiff. The defendant, in her capacity as the plaintiff's solicitor at the material time, had taken all reasonable measures in the safekeeping and retrieval of the plaintiff's said IDT and that the plaintiff's unreasonable conduct, and inaction had contributed to the plaintiff's own losses (see para 8).

(2) The plaintiff had no locus to institute court proceeding against the defendant in view of the plaintiff's disputed ownership in respect of the land which was registered in the plaintiff's wife's name at the material time. Based on the material inconsistencies of the plaintiff's ownership claim over the land in question, the plaintiff did not have the legal capacity to enter into the third SPA with the intending purchaser. Further, the plaintiff had not obtained any written approval from the state authority in respect of the registration of transfer over the land (see para 9).

(3) In determining whether or not the defendant had breached her duty of care, the reasonableness of the parties' conduct must be examined within the perspective and circumstances made known or informed by the plaintiff to the defendant at the material time. The defendant had acted in the best interest of the plaintiff and had clearly adopted all reasonable and appropriate measures in the handling of the plaintiff's IDT. The defendant had not breached the duty of care that was owed to the plaintiff and was clearly not negligent in the performance of her obligations and that the plaintiff's unreasonable conduct and inaction had contributed to his losses (see para 30).

(4) In the absence of a written approval from the state authority for the execution of transfer between the parties, no beneficial interest was conferred on the plaintiff or the plaintiff's wife to execute the respective first, second and third SPA. The plaintiff was prohibited from executing the sale of his land to the intending purchaser without the written approval of the authority. Accordingly, the plaintiff's purported disposal of the land to his purchaser pursuant to the third SPA was, legally unenforceable; hence the plaintiff could not claim any remedy from such act and accordingly, the plaintiff's claim for losses from the purported aborted sale of the land was disallowed (see para 32).

(5) The plaintiff failed to prove alleged loss of profit. Other than the plaintiff's own uncorroborated testimony of the purported sale, there was

no evidence to support the plaintiff's claim of alleged sale and alleged loss of profit from the aborted sale of the plaintiff's land. The plaintiff's testimony in court was generally mere bare assertion and appeared to be inconsistent with the contemporaneous documents before the court and, in some parts contradictory with his own testimony. The plaintiff's narration of events was unreliable. The plaintiff was the maker of his own misfortune (see para 33).

[Bahasa Malaysia summary

Plaintif, seorang bekas anggota Majlis Peguam Malaysia mendakwa terhadap bekas peguamcaranya ('defendan') untuk kecuaian yang dikatakan berlaku ketika mengendalikan satu dokumen hak milik ('DHM') yang mengakibatkan kerugian kepada plaintif. Menurut dua deklarasi amanah, ia didakwa bahawa plaintif menyimpan dengan defendan dokumen hak milik berkaitan sebidang tanah pertanian menurut satu perjanjian jual dan beli dengan penjual asal ('PJB pertama'). Plaintif mendakwa bahawa DHM yang disimpan dengan defendan telah disalah letak oleh defendan pada masa di mana plaintif telah memeterai satu perjanjian jual beli lanjutan dengan Encik Gunasekaran ('pembeli yang berminat') ('PJB ketiga') mengakibatkan jualan tanah plaintif terbatal dan penamatan PJB ketiga plaintif dengan pembeli yang berminat. Plaintif mendakwa bahawa disebabkan kecuaian defendan ketika mengendalikan DHM, plaintif dinafikan peluang untuk menjual tanah dan oleh itu, akibatnya tidak mendapat keuntungan modal berpotensi ke atas pelaburannya. Plaintif menuntut untuk kerugian dan ganti rugi terhadap defendan. Defendan menafikan sebarang kecuaian dalam mengendalikan DHM plaintif dan menghujah bahawa defendan pada semua masa material melakukan dan melaksanakan semua tindakan yang diperlukan dalam menyimpan dan mendapatkan semula DHM plaintif yang tersalah letak. Menurut defendan, plaintif telah menyimpan DHM ke dalam jagaan defendan atas kehendaknya sendiri pada masa di mana plaintif, setelah digantung daripada Majlis Peguam, memerlukan firma defendan untuk menyimpan dokumen-dokumennya dan menguruskan hal ehwal undang-undangnya. Plaintif telah dimaklumkan oleh defendan untuk mengambil dokumen-dokumen peribadi plaintif daripada pejabat defendan tetapi gagal berbuat demikian. Oleh itu, defendan menghujah bahawa kerugian dan kerosakan plaintif disebabkan dan disumbangkan oleh tindakan tidak munasabah plaintif sendiri dan ketiadaan tindakannya. Isu-isu yang timbul untuk ditentukan adalah kapasiti dari segi undang-undang plaintif untuk memeterai PJB ketiga; kecuaian defendan yang didakwa; sama ada transaksi tersebut adalah sah dan sama ada plaintif berjaya dalam membuktikan kerugian.

Diputuskan, menolak tuntutan:

(1) Plaintif gagal untuk membuktikan bahawa defendan cuai ketika

mengendalikan DHM plaintif yang mengakibatkan kerugian berbangkit dan kerosakan kepada plaintif. Defendan, dalam kapasitinya sebagai peguamcara plaintif pada masa material, telah mengambil semua langkah yang munasabah dalam menyimpan dan mendapatkan semula DHM plaintif tersebut dan bahawa tindakan plaintif yang tidak munasabah dan ketiadaan tindakan yang menyumbang kepada kerugian plaintif sendiri (lihat perenggan 8).

(2) Plaintif tidak mempunyai locus untuk memulakan prosiding mahkamah terhadap defendan berhubung tanah yang didaftarkan di bawah nama isteri plaintif pada masa material. Berdasarkan percanggahan utama mengenai tuntutan hak milik plaintif terhadap tanah yang dipersoalkan, plaintif tidak mempunyai kapasiti dari segi undang-undang untuk memeterai PJB ketiga dengan pembeli yang berminat. Seterusnya, plaintif tidak memiliki apa-apa kelulusan bertulis daripada pihak berkuasa negeri mengenai pendaftaran pemindahan terhadap tanah tersebut (lihat perenggan 9).

(3) Dalam menentukan sama ada atau tidak defendan melanggar kewajipan berjati-hatinya, kemunasabahan tindakan pihak-pihak perlu dikaji dalam perspektif dan keadaan yang dimaklumkan atau diberitahu oleh plaintif kepada defendan pada masa material. Defendan telah bertindak bagi kepentingan plaintif dan dengan jelas menggunakan semua langkah yang munasabah dan berpatutan dalam mengendalikan DHM plaintif. Defendan tidak melanggar kewajipan berhati-hati yang ditanggungnya kepada plaintif dan jelas tidak cuai dalam melaksanakan kewajipan-kewajipannya dan bahawa tindakan plaintif yang tidak munasabah dan ketiadaan tindakan telah menyumbang kepada kerugiannya (lihat perenggan 30).

(4) Ketiadaan kelulusan bertulis daripada pihak berkuasa negeri untuk pelaksanaan pemindahan antara pihak-pihak, tidak memberikan kepentingan benefisial kepada plaintif atau isteri plaintif untuk memeterai PJB pertama, kedua dan ketiga. Plaintif dihalang daripada melakukan jualan tanahnya kepada pembeli yang berminat tanpa kelulusan bertulis daripada pihak berkuasa. Oleh itu, penjualan tanah kepada pembelinya menurut PJB ketiga adalah tidak sah di sisi undang-undang; maka plaintif tidak boleh menuntut apa-apa ganti rugi daripada tindakan tersebut dan sehubungan dengan itu, tuntutan plaintif untuk kerugian daripada jualan tanah yang dikatakan terbatal adalah tidak dibenarkan (lihat perenggan 32).

(5) Plaintif gagal untuk membuktikan kehilangan untung seperti yang didakwa. Selain daripada keterangan plaintif sendiri yang tidak disokong mengenai jualan tersebut, tiada keterangan yang menyokong dakwaan plaintif mengenai jualan dan kehilangan keuntungan seperti yang didakwa daripada pembatalan jualan tanah plaintif. Keterangan plaintif

di mahkamah hanyalah dakwaan kosong semata-mata dan dilihat tidak konsisten dengan dokumen-dokumen sezaman yang dikemukakan di mahkamah dan, pada beberapa bahagian bercanggah dengan keterangannya sendiri. Cerita plaintif mengenai peristiwa-peristiwa adalah tidak boleh dipercayai. Plaintif yang membawa musibah kepada dirinya sendiri (lihat perenggan 33).]

Notes

For cases on damages, see 12 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1123–1141.

Legislation referred to

Contracts Act 1950 s 24(b)
Evidence Act 1950 s 114(g)

Lian Meng Wah in person.
Lim Kian Leong (KS Cheah with him) (Lim Kian Leong & Co) for the defendant.

Nik Hasmat JC:

BACKGROUND FACTS

[1] The plaintiff, a former member of the Malaysian Bar has instituted a suit against his former solicitor which was premised on the later's purported negligence in the handling of an issue document of title which had resulted in losses to the plaintiff. Pursuant to two declaration of trusts dated 18 June 2004 and 28 June 2004, the plaintiff deposited with the defendant, his then solicitor the issue document of title in respect of a piece of agriculture land held under GM 319, Lot No 1237, Mukim Kenaboi, District of Jelebu, Negeri Sembilan ('the said IDT'). The land was registered in the plaintiff's wife's name, Tan Mei Lan pursuant to a sale and purchase agreement dated 14 May 1997 between the plaintiff's wife and the original vendor, Lim Yoke Hing ('the first SPA').

[2] The plaintiff claimed that 'the said IDT' which had been deposited with the defendant was misplaced by the defendant at a time when the plaintiff had entered into a further sales and purchase agreement with an intending purchaser, one Mr Gunasekaran dated 2 June 2005 ('the third SPA'). The plaintiff alleged that the defendant's alleged misplacement of 'the said IDT' and failure to produce and deliver to the plaintiff's solicitor, Messrs Chim Yiam & Associates within the specified timeline of seven days have resulted in the aborted sale of the plaintiff's land and the termination of the plaintiff's 'third SPA' with the intending purchaser.

[3] The plaintiff claimed that due to the defendant's alleged negligence in the

handling of 'the said IDT' the plaintiff was denied of an opportunity to sell the land to the intending purchaser and, consequently deprived of potential capital gain on his investment.

[4] Therefore, the plaintiff is claiming for the losses and damages to the plaintiff as stated in para 11 of the plaintiff's summons and statement of claim. The plaintiff's claims against the defendant are as follows:

(a) RM415,135 being the plaintiff's loss of profit namely the differential sum between the purchase price of RM700,000 under 'the third SPA' and the purchase price of RM285,000 under 'the first SPA', up to 5 July 2005;

(b) interests at the rate of 8% effective from 6 July 2005 until full realisation of the judgment sum; and

(c) costs and further other relief deemed fit by the court.

THE DEFENDANT'S CASE

[5] The defendant denied any negligence in the handling of the plaintiff's 'said IDT' and contend that the defendant had at all material times done and executed all necessary acts as regards to the safekeeping and retrieval of the plaintiff's misplaced IDT. According to the defendant, the plaintiff had deposited the 'said IDT' into the defendant's custody on his own accord at a time when the defendant having been suspended from the Bar required the defendant's firm to store his documents and manage his legal affairs. The plaintiff had been informed by the defendant to collect his personal documents from the defendant's office but had failed to do so. The defendant therefore contends that the plaintiff's purported losses and damages is caused and contributed by the plaintiff's own unreasonable conduct and inaction.

[6] The defendant contend that 'the third SPA' which was purportedly executed between the plaintiff and his intending purchaser is void and legally unenforceable as no written approval had been obtained from the land authority in respect of the registration of transfer over the land.

[7] The defendant further contend that the plaintiff's institution of the court proceeding is malicious and not made in good faith. The court proceeding was intended to oppress and cause undue fear to the defendant as the plaintiff was alleged to have intimidated the defendant and deceived the defendant's insurers into settling the plaintiff's claim. As prayed in para 12(8)(a–d) of the defendant's statement of defence and counterclaim, the defendant is counter claiming against the plaintiffs as follows:

(a) general damages amounting to RM7,000,000;

(b) special damages amounting to RM300,000;

(c) costs; and

(d) any other relief deemed fit by the court.

ISSUES

(a) Whether the plaintiff have the locus standi to institute claim against the defendant;

(b) whether the plaintiff's 'third SPA' is tainted with fraud and illegality;

(c) whether the plaintiff's 'third SPA' is void and legally unenforceable as no approval in writing has been obtained from the state authority in respect of the dealing involving the land;

(d) whether the defendant in her capacity as the plaintiff's solicitor at the material time owe any duty of care to the plaintiff in respect of 'the said IDT' which had been deposited with the defendant pursuant to the plaintiff's execution of two deed of declaration of trust;

(e) whether the defendant in failing to produce 'the said IDT', when so requested by the plaintiff was negligent in the exercise of her duty;

(f) whether the defendant have discharged and done all reasonable acts necessary in the handling of 'the said IDT' and proved the defendant's losses and damages as claimed; and

(g) whether the defendant's purported negligence have resulted in the plaintiff's loss and damages.

THE COURT JUDGMENT

[8] Based on the oral and documentary evidence adduced before this court, the written submission from both parties, the court on a balance of probabilities is satisfied that the plaintiff has failed to prove that the defendant was negligent in the handling of the plaintiff's said IDT which resulted in consequent losses and damages to the plaintiff. The court having considered the evidence in its entirety, finds the defendant in her capacity as the plaintiff's solicitor at the material time have taken all reasonable measures in the safekeeping and retrieval of the plaintiff's said IDT and that the plaintiff's unreasonable conduct, and inaction had contributed to the plaintiff's own losses.

[9] The court further finds that the plaintiff has no locus to institute court

proceeding against the defendant in view of the plaintiff's disputed ownership in respect of the land which was registered in the plaintiff's wife's name at the material time. Based on the material inconsistencies as regard to the plaintiff's ownership claim over the land in question, the court further finds that the plaintiff did not have the legal capacity to enter into 'the third SPA' with the intending purchaser, one Gunasekaran. Further, it is also clear to the court that the plaintiff had not obtained any written approval from the state authority in respect of the registration of transfer over the land and accordingly, the plaintiff's claim as specified in para 11 of the plaintiff's summons and statement of claim is dismissed with costs.

[10] In respect of the defendant's counterclaim against the plaintiff, the court further finds that the defendant has failed to establish that the plaintiff's claim is an abuse of the court process and accordingly dismiss the defendant's counterclaim.

[11] Thus, the plaintiff's claim as per para 11 of the plaintiff's summons and statement of claim and the defendant's counterclaim as per para 12(8)(a–d) of the defendant's statement of defence and counterclaim is disallowed with costs.

THE GROUNDS OF JUDGMENT

Legal capacity of the plaintiff to execute 'the third SPA'

[12] It is clear to the court that the plaintiff did not have the locus standi to institute this court action against the defendant due to his disputed ownership over the land in question and the material inconsistencies in the plaintiff's evidence with regard to the same. Based on the plaintiff's assertion as pleaded in the plaintiff's statement of claim, plaintiff had clearly relied on his beneficial ownership as basis for his claim, pursuant to the first SPA. In his claim before this court, the plaintiff had relied on the first SPA to support his claim that he has the legal capacity and locus standi to institute action against the defendant due to his beneficial interest in the land.

[13] However, in an earlier application for summary judgment against the defendant, which was filed on 13 December 2005, the plaintiff had produced a second sale and purchase agreement which had been, executed between him and the original vendor on the same date of the first SPA as exhibited in P12 ('the second SPA'). The plaintiff had then affirmed that the first SPA had been revoked and replaced by the second SPA and that as the owner of the land in question, he therefore has the locus standi to institute action against the defendant. In his testimony in court, the plaintiff further confirmed that the second SPA had replaced the first SPA and that in respect of the sale of the land

in question, the applicable agreement is the second SPA. The plaintiff however did not produce the plaintiff's second SPA during the trial proceeding before the court.

[14] In the light of the material inconsistencies in the plaintiff's assertion in relation to his ownership over the land arising from the status of both the first and second SPA, the plaintiff's ownership of the property is seriously in dispute. The plaintiff was evasive and vague when questions were levelled at him during the cross-examination as to the status of both the first and second SPA. The plaintiff appear reluctant to admit to the glaring material contradiction between his affirmation in his affidavit that the first SPA had been terminated and superseded by the second SPA, from that of his present claim before this court which had relied on the first SPA as regards to the plaintiff's beneficial ownership in the land.

[15] In this regard, it is trite that he who assert must prove. The burden rests with the plaintiff to prove that, in his capacity as the legal or beneficial owner of the land, the plaintiff has the legal right to execute the third SPA to sell the land to a third party, Mr Gunasekaran. The plaintiff is further required to prove the existence and validity of the sale transaction pursuant to the third SPA, and that the defendant's negligent handling of the plaintiff's said IDT have resulted in losses and damages to the plaintiff. In this regard, the court questioned the validity of the plaintiff's purported sale to his intending purchaser due to the plaintiff's disputed legal capacity to enter into the said 'the third SPA'. The plaintiff's conduct in the purported sale of the land to a third party, and the validity of the purported sale is fraught with uncertainty and illegality that preclude the plaintiff from potentially benefiting and profiteering from its purported sale.

[16] Having viewed the totality of the evidence from the plaintiff, the plaintiff's claim is proven to be misleading and misconceived. The court finds that the plaintiff's claim is not based on established fact or evidence, is clearly self serving and misleading and, is primarily based on the plaintiff's own uncorroborated testimony. There is clear failure on the part of the plaintiff to produce material and vital witnesses to corroborate the plaintiff's claim.

[17] In the light of material inconsistencies and contradiction in the plaintiff's evidence in support of his claim for losses arising from purported aborted sale of his property and given the surrounding circumstances alluding the defendant's appointment as the plaintiff's solicitor, the plaintiff's failure to produce material and vital witnesses, to confirm the existence and the validity of the sale transaction and the plaintiff's non production of vital corroborative document to support the plaintiff's claim, namely the second SPA allow the court to invoke an adverse inference presumption against the plaintiff that the

second SPA and witnesses, if produced would not be favourable to the plaintiff's case. Pursuant to s 114(g) of the Evidence Act 1950 which provides as follows:

> 114 Court may presume existence of certain fact
>
> The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.
>
> The court may presume —
>
> (g) that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it.

[18] Accordingly a presumption of adverse inference have been drawn by the court to conclude that had vital witnesses, namely the intending purchaser, Mr Gunasekaran, the plaintiff's wife, or the legal representative from Messrs Chim Yiam & Associates have been produced by the plaintiff, their evidence would have been unfavourable to the plaintiff.

[19] Further, notwithstanding the material inconsistencies in the plaintiff's ownership claim, based on the clear, unequivocal terms of the plaintiff's two declaration of trusts which were executed on 18 June 2000 and exhibited in exhs P1 and P2, it is clear to the court that the plaintiff had executed an unequivocal declaration that his entire estate is held in trust for his wife and children. Significantly, at the material time of the plaintiff's execution of the trust declaration, the plaintiff had been suspended from his legal practice and had enlisted the assistance of the defendant to attend to his legal matters. It is clear to this court that in the light of the plaintiff's suspension from the Bar, the plaintiff's timely execution of the trusts is self serving and would have been intended to circumvent and avoid any possible legal persecution from the plaintiff's creditors. Accordingly, the court thus finds the plaintiff's claim as misconceived and mischievous. Further, as the land was clearly held in trust for the plaintiff's wife and children, it is clear to the court that the plaintiff had executed the third SPA without locus.

[20] Therefore in the light of the plaintiff's conflicting and uncorroborated assertion of ownership over the land and the plaintiff's failure to produce documents and material witnesses in support of his claim, the court accordingly consider the plaintiff's reliance on his purported ownership over the land as basis for the plaintiff's claim against the defendant for the purported losses from the aborted sale of the land as clearly unproved.

Alleged negligence of the defendant

[21] Based on two declaration of trusts dated 18 June 2004 as exhibited in

exh P1 and 28 June 2004 exh P2, it is clear that the plaintiff pursuant to the declaration of trusts, had deposited the said IDT into the possession and custody of the plaintiff's solicitor, the defendant. It was not disputed that the plaintiff had deposited the said IDT with the defendant's legal firm on or about 28 June 2000 at a time when the plaintiff was suspended from legal practice.

[22] The plaintiff at the material time had requested the defendant to assist and attend to the management of his legal matters. The plaintiff had required the defendant's assistance in the storage of his personal documents in the defendant's office including the 'said IDT'. According to the plaintiff he had lost an opportunity pursuant to the 'third SPA' to sell the land to a third party, Gunasekaran, as the 10% deposit payment amounting to RM70,000 could not be cashed due to the defendant's misplacement of 'the said IDT'. The plaintiff assert that, as the plaintiff's solicitor, the defendant should exercise reasonable care in the handling of the plaintiff's document which had been placed into the defendant's custody, particularly as the defendant had admitted to the loss of 'the said IDT'.

[23] It is clear that due to the plaintiff's predicament, namely the plaintiff's suspension of legal practice, the plaintiff had deposited his personal documents into the defendant's custody for safekeeping purposes. The plaintiff merely requested for the return of the said IDT through the plaintiff's solicitor, Messrs Chim Yiam & Associates's letter of demand dated 10 June 2005, which gave the defendant seven days notice to return the IDT failing which the plaintiff threatened the defendant with a legal action.

[24] It is clear to the court that based on the conduct of the plaintiff, the plaintiff had acted unreasonably in his immediate and urgent demand for the return of 'the said IDT' from the defendant. The defendant had earlier requested the plaintiff to collect his documents including the IDT from the defendant's office which were kept for a period of one year. The plaintiff had however deliberately ignored, failed and neglected to collect the IDT despite the repeated requests of the defendant for the collection of plaintiff's documents. The court therefore view the plaintiff's sudden interest and urgent demand for the return of the misplaced IDT within the seven day timeline and the plaintiff's immediate commencement of this court proceeding within a month period from the defendant's letter dated 22 June 2005 as unreasonable and unjustifiable. It is clear that the plaintiff as confirmed in court, had not informed the defendant of the plaintiff's need for the IDT for the purpose of the sale and further, the plaintiff had hitherto clearly displayed an air of indifference to the importance of his documents which had been kept into the defendant's custody on the plaintiff's own accord.

[25] Further, the court finds no special provision had been in the trust

documents to require the defendant to provide special care and attention for the said IDT. Neither was there a provision to mandate the defendant to produce the said IDT to the plaintiff within the specified seven day timeline as was imposed by the plaintiff. The court therefore conclude that as the plaintiff did not specifically provide for an express term in the trust declaration for the safekeeping of the said IDT, the plaintiff's sudden insistence and abrupt demand for the immediate return of the said IDT was highly questionable and, clearly unreasonable.

[26] The defendant had at all material times been proven to have acted diligently as she reasonably could in ensuring the safekeeping of the plaintiff's documents and the handling of the plaintiff's IDT. Upon discovery of the loss of the said IDT, the defendant took all necessary measures to locate the missing IDT within the seven day dateline that had been unilaterally and unduly imposed on her by the plaintiff. The defendant further attempted to mitigate the plaintiff's loss by proposing to the plaintiff to consider applying for a duplicate copy of the title from the land office. To this effect, the defendant prepared a letter to enable the plaintiff to apply from the land authority for a duplicate copy of the land title dated 22 June 2005 exh in P6 which questionably, was not heeded by the plaintiff. The court therefore finds the plaintiff's immediate institution of the court suit within a month from the defendant's issuance of P6 unreasonable, as an application to the land office for the issuance of its copy would clearly have been an adequate and appropriate recourse for the plaintiff's remedy.

[27] In any event, the IDT was discovered and ultimately delivered by the defendant to the plaintiff on 7 September 2005, less than threee months from the defendant's self imposed timeline. In the light of the prevailing circumstances alluding the defendant's appointment as the plaintiff's solicitor and having regard to the circumstances made known to the defendant, it is clear that the defendant had at all material times executed her obligations in respect of the plaintiff's documents as stated in the trust documents of the plaintiff. Accordingly, the court thus finds no evidence of negligence on the part of the defendant in the misplacement of 'the said IDT' and the handling of the plaintiff's documents.

[28] Further, it is also clear to the court that the plaintiff's underlying motive for the defendant's appointment to handle his legal matters was to circumvent the plaintiff's suspension and facilitate his continued 'illegal' legal practice. In this regard, the defendant had confirmed in court that the plaintiff had informed her of impending possible confiscation of his assets due to his suspension from the Bar. The defendant was accordingly appointed to execute the plaintiff's declaration of trusts dated 18 June 2004 and 28 June 2004 where pursuant to the trust declaration, plaintiff had declared that the plaintiff's

assets were to be held in trust for his family and the plaintiff's documents including 'the said IDT' were deposited with the defendant.

[29] According to the defendant, the plaintiff had left her office in July or August 2004 after a row between both parties in relation to her discomfort with the plaintiff's illegal and unethical practices where documents were requested of the defendant to be affirmed without the presence of parties. The defendant further confirmed that plaintiff was not merely using the defendant's office to store his files and to carry out personal matters, but instead appear to be carrying out his own 'illegal legal office' in the defendant's office. Thus based on the circumstances that surrounded the defendant's appointment as the plaintiff's solicitor, it is clear to the court that the plaintiff did not come to court with clean hands and that his uncorroborated allegation of the defendant's negligence in the defendant's handling of 'the said IDT' is misconceived and, clearly, self serving.

[30] In determining whether or not the defendant has breached her duty of care, the reasonableness of the parties' conduct must be examined within the perspective and circumstances made known or informed by the plaintiff to the defendant at the material time. Based on the oral testimonies of both parties, evidence surrounding the defendant's appointment as the plaintiff's solicitor and scope of duty as was declared in both the trust documents in exhs P1 and P2, the court concluded that the defendant had acted in the best interest of the plaintiff and had clearly adopted all reasonable and appropriate measures in the handling of the plaintiff's IDT. The defendant had not breached the duty of care that was owed to the plaintiff and was clearly not negligent in the performance of her obligations and that the plaintiff's unreasonable conduct and inaction had contributed to his losses.

Illegality of transaction

[31] It was clear that the land had a restriction in interest which prohibits any dealing on the land without approval in writing from the state authority. The plaintiff had confirmed that pursuant to the first SPA between the plaintiff's wife and the original vendor, his wife being the registered owner of the said land did not make any application to the state authority for a consent to transfer the land. The plaintiff further confirmed that he did not submit any application to the state authority to obtain interest in the land, pursuant to the subsequent second SPA and third SPA. The plaintiff had then explained in court that the reason that no application was made to the state authority for consent to transfer was to save time, expense and to maximise capital gain. As the land quite clearly could not be transferred, charged or leased without the consent in writing of the state authority, and as consent to transfer had not been obtained even in respect of the first SPA with the original vendor, it is therefore clear that

no enforceable contract could be concluded as the land is still registered in the name of the original vendor. Further, the plaintiff's reason for not submitting any application on the ground that he wanted to save stamp duty and to save time and expense arising from two consents to transfer, clearly contradicts s 24(b) of the Contracts Act 1950 and renders the plaintiff's act illegal and unenforceable.

[32] Thus, in the absence of a written approval from the state authority for the execution of transfer between the parties, it is clear that no beneficial interest was conferred on the plaintiff or the plaintiff's wife to execute the respective first, second and third SPA. The plaintiff is therefore prohibited from executing the sale of his land to the purported purchaser, Mr Gunasekaran without the written approval of the authority. Accordingly, the plaintiff's purported disposal of the land to his purchaser pursuant to the third SPA is, legally unenforceable, hence the plaintiff cannot claim any remedy from such act and accordingly the plaintiff's claim for losses from the purported aborted sale of the land is disallowed.

The plaintiff's failure to prove losses

[33] Based on the foregoing, the court finds that the plaintiff has failed to prove the plaintiff's alleged loss of profit amounting to RM415,135 from the purported sale of land to Gunasekaran. Other than the plaintiff's own uncorroborated testimony of the purported sale, there is no evidence before this court to support the plaintiff's claim of alleged sale and alleged loss of profit from the aborted sale of the plaintiff's land. The plaintiff's testimony in court is generally mere bare assertion and appears to be inconsistent with the contemporaneous documents before the court and, in some parts contradictory with his own testimony. The court finds the plaintiff's narration of events unreliable, and concludes that the plaintiff is the maker of his own misfortune.

[34] The plaintiff could have mitigated his alleged loss where the plaintiff as was advised by the defendant, could have proceeded with the sale on the plaintiff's land by applying for a duplicate copy of the land title. In any case, the missing 'IDT' had been undisputedly left unclaimed at the defendant's office by the plaintiff for a period of a year and that the misplaced IDT was ultimately recovered and retrieved within a reasonable period of three months after the plaintiff's purported sale of the land. Accordingly, the court is of the view that the plaintiff's urgent demand for the immediate return of 'the said IDT' vide solicitor's letter dated 10 June 2005 was unreasonable given the fact that 'the said IDT' had been left unclaimed at the defendant's office for a considerable period.

[35] The plaintiff's act in leaving important personal documents tantamount to unreasonable conduct. The court could only dwell on the plaintiff's rationale for leaving important document unclaimed from the defendant's office, given the 'bad blood', deteriorating relationship between both parties and the circumstances leading to the plaintiff's abrupt departure from 'his practice' at the defendant's office. Further, the court finds the plaintiff's sudden interest in the unclaimed IDT, the plaintiff's undue insistence on the defendant's immediate return of 'the said IDT' within the limited specified timeline and, the plaintiff's immediate commencement of the court proceeding against the defendant highly speculative. The plaintiff had clearly, hitherto displayed a general indifference to the significance of the documents that had been left unclaimed at the defendant's office.

[36] Therefore, the court finds that the plaintiff on a balance of probability has failed to prove his claim against the defendant. The plaintiff's claim as stated in para 11 of the plaintiff's summons and statement of claim is dismissed with costs and based on the grounds aforesaid, the plaintiff's appeal should accordingly be dismissed.

Claim dismissed.

Reported by Afiq Mohamad Noor